No. 80-1141

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

October Term, 1980

ESTATE OF ANNABEL L. CADY, Deceased, ELWYN L. CADY, JR., Ancillary Administrator,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ELWYN L. CADY, JR.
Counsel of Record
1919 Drumm Avenue
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Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

I. Whether error was committed below by considering a rebuttable presumption in the government's favor once appellant had introduced factual rebutting evidence?

II. Whether error occurred, based upon misconception and misapplication of law, in determining the dominant motive of a decedent in making monetary gifts to her son and daughter-in-law?

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CITATIONS TO CASE BELOW

T. C. Memo 1979-318

(P.H Memo T.C. par. 79,318)

The opinion of the Court of Appeals is not yet reported.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1980. Timely Motion for Rehearing was filed, and was denied on October 8, 1980. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2035 [as amended by Sec. 18(a)(2)(C), Revenue Act of 1962, P.L. 87-834, 76 Stat. 960]. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) *General Rule.*—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) *Application of General Rule.*—If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year

period shall be treated as having been made in contemplation of death.

* * *

Treasury Regulations on Estate Tax (1954 Code) (26 C.F.R.):

§ 20.2035-1 *Transactions in contemplation of death.*

(a) *In general.* A decedent's gross estate includes under section 2035 the value of any interest in property transferred by a decedent in contemplation of death within 3 years before his death, except to the extent that the transfer was for a full and adequate consideration in money or money's worth (see § 20.-2043-1). With the exception noted in the preceding sentence, the decedent's gross estate includes as a transfer in contemplation of death the value of any interest in property transferred within 3 years before the decedent's death, unless the transfer is shown not to have been made in contemplation of death. The result is not affected by the fact that at the time of the transfer the decedent parted absolutely and immediately with his enjoyment of and title to the property.

* * *

(c) *Definition.* The phrase "in contemplation of death", as used in this section, does not have reference to that general expectation of death such as all persons entertain. On the other hand, its meaning is not restricted to an apprehension that death is imminent or near. A transfer "in contemplation of death" is a disposition of property prompted by the thought of death (although it need not be solely so prompted). A transfer is prompted by the thought of death if (1)

made with the purpose of avoiding death taxes, (2) made as a substitute for a testamentary disposition of the property, or (3) made for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition.

STATEMENT OF THE CASE

Suit was brought in the Tax Court for a redetermination of deficiencies assessed. 26 U.S.C. § 6214 (a). Original issues have been narrowed so that the only remaining question is whether or not certain monetary gifts made by decedent to her son and daughter-in-law within three years of her death were in contemplation of death. Upon trial before Judge Forrester, with briefs submitted, the court held that the gifts were made in contemplation of death.

The basic fact upon which petitioner relied was that "decedent, in making gifts, was desirous that the donees, parents of her only grandchild, born February 13, 1970, be financially independent to the extent that they could render extraordinary attention to the youngster by time expenditure and educational activities in derogation of their other professional duties and interests."

The only witness at trial was the son, whose testimony and exhibits were adduced in support.

The Findings of Fact, as corrected, were conceded with the following exceptions:

(a) "(decedent) was upset by the recent suicide of a distant cousin at this time."

(b) "The results (of a physical examination) show apparent arteriosclerotic narrowing in an obese woman."

(c) "She was also becoming increasingly aware of her own physical decline."

(d) "On April 24, 1974, decedent was diagnosed as deteriorating of natural causes."

(e) Additional Proposed Findings of Fact submitted were omitted:

1. There is a proponderance of evidence that a thought of death was not the dominant motive for gifts made to her son and daughter-in-law by decedent.

2. A pattern of gifts began at least by 1956 and continued while decedent's husband was alive.

3. A reasonable inference is drawn that decedent recognized the necessity of life motives rather than death motives in a gifting program within the family.

4. (The basic fact—the direct statement of her motive to her son, *supra.*)

5. Other circumstances tend to establish that decedent was given to a philosophy that "Life Begins at 80" with accent on "Abundant Living" rather than on thoughts of death.

ARGUMENT

I. Positive Legal Error Was Committed When the Judge Weighed the *COD* Rebuttable Presumption Along With Circumstantial Evidence in Reaching His Decision

The initial statutory presumption in favor of the government in a *COD* (contemplation of death) case does no more than "make a taxpayer show his hand" in the onomastic expression of Judge Learned Hand. *United Business Corp. v. Comm'r*, 62 F. 2d 754, 755. Once evidence is adduced to controvert the presumption, it disappears from the case and is of no probative force. See the recent incisive analysis of Judge Robinson, *Legille v. Dann*, 544 F. 2d 1, 5-7, 178 App. D. C. 78, citing the famous quote of Judge Lamm—(rebuttable presumptions) "may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts"—in *Mackowik v. Kansas City, St. J. & C. B. R.R.*, 196 Mo. 550, 94 S.W. 256, 262 ("That presumptions have no place in the presence of the actual facts . . .").

Patently, the tax court judge took the presumption into consideration in his decision. The opinion speaks: "A rebuttable presumption in respondent's favor exists. . ."; "These circumstances all strongly support the statutory presumption. . . ."

Positive, patent, clearly reversible error occurred.

The Court of Appeals merely rubber-stamped the Tax Court Judge's error of weighing a rebuttable presumption. Not only does it place the Eighth Circuit in conflict with the Second Circuit and the D. C. Circuit—it resurrects an obsolete and thoroughly discredited concept.

II. The Courts Below Misconceived and Misapplied the Law in Determining the Dominant Intent of the Decedent in Making Gifts to Her Son and Daughter-in-Law

The Court of Appeals held that the Tax Court judge had not proceeded under any misapprehension of the law.

It is submitted that the opinion below is plainly wrong.

The T. C. opinion recites a phrase from the unopposed testimony, without mention of the background facts, and then implies a test of whether or not the grandson's life was to be "easier," that the fact that the *grandson,* of tender years, was not taken to Swope Ridge to visit his delusional grandmother, somehow established that she was not interested in the financial independence of her *son* and *daughter-in-law.*

The T. C. opinion, mentioning an argument dealing with whether or not decedent should have a will and stating that "we must reasonably assume that decedent's lack of will ties in with her son's intention to give her estate away." This record is completely devoid of any such legal argument and any such intention of the son.

The T. C. and the Court of Appeals both misapprehended the legal status of direct evidence of a special life motive in weighing evidence in a COD-type case. See *Cleveland Trust Co. v. United States,* 421 F. 2d 475, 478, cert. denied, 400 U.S. 819. This type-case is one in which the basic preference of direct over circumstantial evidence is such that tradition admonition to triers of fact that when the circumstances relied upon with respect to a proposition (here, "death intention") can be explained by any other reasonable theory (here, direct evidence of a special "life motive"), the "non-circumstantial" (i.e., direct)

testimony shall prevail. Especially does this obtain when the circumstantial evidence is that classed as "uncertain." CYCLOPEDIC LAW DICTIONARY (2d ed. 1922) 166.

Respectfully submitted,

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Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1069

Estate of Annabel L. Cady, deceased, Elwyn L. Cady, Jr., Ancillary Administrator,
Appellant,

v.

Commissioner of Internal Revenue,
Appellee.

Appeal from the United States Tax Court

Submitted: September 10, 1980
Filed: September 16, 1980

Before HENLEY and McMILLIAN, Circuit Judges, and BECKER, District Judge.*

PER CURIAM.

The single issue on appeal is whether the Tax Court erred in finding that decedent's transfers totalling $41,900

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*The Honorable William H. Becker, United States Senior District Judge, Western District of Missouri, sitting by designation.

in cash to her son and daughter-in-law were "in contemplation of death" within the meaning of section 2035 of the Internal Revenue Code of 1954[1] and thus includable in the gross estate. We affirm.

Because the transfers were made without consideration and within three years of Mrs. Cady's death, they are deemed to have been made in contemplation of death "unless shown to the contrary." Int. Rev. Code of 1954 § 2035(b). Treas. Reg. § 20.2035-1 (1958). The Tax Court held that evidence introduced by the Commissioner supported the statutory presumption and that the taxpayer had failed to prove that the transfers were not in contemplation of death. *Peters v. United States*, 572 F.2d 851, 854 (Ct. Cl. 1978); *Estate of Lowe v. Commissioner*, 555 F.2d 244, 245 (9th Cir. 1977); *Berman v. United States*, 487 F.2d 70, 72-73 (5th Cir. 1973).

The dominant purpose of the section is to prevent the evasion of estate taxes by transfers in lieu of testamentary dispositions. *United States v. Wells*, 283 U.S. 102, 117 (1931). The test is always the state of mind of the donor. *Id. See also Smails v. O'Malley*, 127 F.2d 410, 414 (8th Cir. 1942). We have reviewed carefully the arguments advanced by the parties with regard to the decedent's motives—as evidenced by her age, health,

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1. Int. Rev. Code of 1954, ch. 736, § 2035(a), 68A Stat. 381.

Section 2035 was amended by the Tax Reform Act of 1976 to eliminate "contemplation of death" as the standard for inclusion in the gross estate. Tax Reform Act of 1976, Pub. L. No. 94-455, Title XX, § 2001(a)(5), 90 Stat. 1848. For transfers made on January 1, 1977 or thereafter the Act provides, generally, that "the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the three year period ending on the date of decedent's death." 26 U.S.C. § 2035(a).

The transfers in question here were made in 1972, 1973 and 1974.

and desire to avoid estate taxes, etc. in making the gifts.[2] We do not find that the Tax Court proceeded under any misapprehension of the law or that its findings of fact are clearly erroneous. Fed. R. Civ. P. 52(a); 26 U.S.C. § 7482(a); *Commissioner v. Duberstein,* 363 U.S. 278, 291 (1959); *McCaughn v. Real Estate Land Title & Trust Co.,* 297 U.S. 606, 608 (1935); *Charles Schneider & Co., Inc. v. Commissioner,* 500 F.2d 148, 151 (8th Cir. 1974). Therefore, the judgment of the Tax Court must be, and it is, affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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2. *Smails v. O'Malley,* 127 F.2d 410, 414 (8th Cir. 1942). *See also* Treas. Reg. § 20.2035-1 (1958).

The Tax Court did not explicitly attribute the son's apparent motive to avoid estate tax to his mother and we do not rely thereon. However, we note that there is authority for imputing the donee's motives to the donor in an appropriate case. *See City Bank Farmers Trust Co. v. McGowen,* 323 U.S. 594, 598-99 (1945); *Haneke v. United States,* 548 F.2d 1138, 1140-41 (4th Cir. 1977).

T.C. Memo. 1979-318

UNITED STATES TAX COURT

ESTATE OF ANNABEL L. CADY, Deceased, ELWYN L. CADY, JR., Ancillary Administrator, Petitioner *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 11664-77. Filed August 15, 1979.

Elwyn L. Cady, Jr., pro se.

James T. Million, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

FORRESTER, *Judge*: Respondent has determined an estate tax deficiency of $4,397.62, and a section 6651(a)[1] addition to the tax in the amount of $219.88. Concessions having been made, the two issues for our decision are:

(1) Whether the transfers made by decedent Annabel L. Cady of cash within the 28 months immediately preceding her death to her only heir apparent and to his wife are includable in the decedent's gross estate as transfers in contemplation of death within the meaning of section 2035; and

(2) Whether the estate is liable for the additions to the tax imposed under section 6651(a)(1).

1. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found.

Annabel L. Cady (hereinafter decedent) died intestate on August 9, 1974, at the age of 77, while a resident of the Swope Ridge Health Care Center. The ancillary administrator of her estate, Elwyn L. Cady, Jr. (hereinafter petitioner), is decedent's son and only surviving child. He resided at 1919 Drumm Avenue, Independence, Missouri, at the time the petition herein was filed. The Federal estate tax return herein was filed with the St. Louis Internal Revenue Service District Director's office, Kansas City Branch.

Prior to the year 1972, decedent had little history of gift giving in her own name. However, Elwyn Loomis Cady, decedent's husband, had made gifts which ranged in size from approximately $1,000 to $6,000 per year, commencing approximately in 1956 and ending with his death on December 15, 1970.

During the years 1972, 1973, and 1974, decedent made the following gifts:

Date	Donee	Amount
4/27/72	E. L. Cady, Jr.	$3,000.00
7/18/72	Jane E. Cady (wife of E. L. Cady, Jr.)	3,000.00
10/13/72	E. L. Cady, Jr.	5,000.00
11/23/72	E. L. Cady, Jr.	5,000.00
12/26/72	E. L. Cady, Jr.	1,400.00
5/13/73	E. L. Cady, Jr.	3,000.00
10/09/73	Jane E. Cady	3,000.00
10/11/73	E. L. Cady, Jr.	1,000.00
11/07/73	E. L. Cady, Jr.	775.85
11/15/73	E. L. Cady, Jr.	2,000.00

Date	Donee	Amount
12/24/73	E. L. Cady, Jr.	6,224.15
12/27/73	E. L. Cady, Jr.	2,500.00
7/11/74	Jane E. Cady	3,000.00
7/11/74	E. L. Cady, Jr.	3,000.00
		$41,900.00[2]

All of the aforementioned gifts were made by checks drawn on decedent's account at the City National Bank and Trust Company, Kansas City, Missouri. Decedent executed a document on July 18, 1972, authorizing petitioner, as her son, to sign checks on this account. This signature authority was never revoked by decedent.

Prior to 1972, decedent's history of hospital and institutional care was negligible; however, she was admitted to the Menorah Medical Center (hereinafter Menorah) in Kansas City, Missouri, on March 29, 1972, for treatment of a mental condition known as paranoid delusions. Decedent entered Menorah with the assistance of her son. At the time of her admission to Menorah decedent was taking medication for hypertension, leg cramps and pain.

During the month preceding her admission to Menorah in March 1972, decedent had portrayed irrational fears, including the feeling that her neighbors were trying to break into her apartment. She also felt unsafe in her bathroom.

On April 3, 1972, decedent was given an EKG[3] at Menorah. The results of this test disclosed an abnormal brain

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2. Total gross estate, as returned, was $54,427.79, consequently these gifts constitute more than 43 percent of what the gross estate would have been.

3. An EKG is an electroencephalogram which is the record, obtained by means of an electroencephalograph of the brain potentials derived from scalp electrodes. Stedman's Medical Dictionary (1972).

wave pattern indicative of an inefficient blood supply to the brain. Decedent was fearful of impending danger and was upset by the recent suicide of a distant cousin at this time.

Decedent was given a physical examination on March 29, 1972, by Dr. B. Milgram at Menorah. The results show apparent arteriosclerotic narrowing in an obese woman. Decedent was diagnosed as having psychotic depression. She was also becoming increasingly aware of her own physical decline.

Decedent was discharged from Menorah on April 18, 1972. At that time she was taking, and continued with various medications. She then moved to the Defenders Townhouse (Defenders), a retirement center located in Kansas City, Missouri. Decedent stayed in Defenders from April 18, 1972, until May 31, 1972. She was then moved to the Swope Ridge Health Care Center, also located in Kansas City, where she remained until her death on August 9, 1974.

On April 24, 1974, decedent was diagnosed as deteriorating of natural causes. During the gift-giving period in question, decedent required assistance in eating, walking, and dressing herself. Decedent was age 77 at the time of her death and the immediate cause of death was diagnosed as arteriosclerotic disease due to, or as a consequence of, Parkinson's disease.

Decedent did not, and was not required to, file a Federal income tax return for the calender year 1971. However, Federal income tax returns were filed for decedent for the calendar years 1972 and 1973, and for the period of January 1 through August 9, 1974. The returns showed the following:

Period	Adjusted Gross Income	Total Medical Expenses
1972	$11,150.07	$ 6,758.19
1973	10,811.60	8,630.18
Jan. 1 through Aug. 9, 1974	3,781.00	4,869.17
	$25,742.67	$20,257.54

Decedent's son was the donee of 12 of the 14 gifts here at issue. He was decedent's sole heir at the time such gifts were made. The donee of the remaining two gifts was his wife. Decedent's son decided on the amounts, dates, and donees of all 14 of the gifts in question.

OPINION

From April 27, 1972 through July 11, 1974, less than three years prior to her death on August 9, 1974, decedent transferred $41,900 from her checking account on 14 separate occasions to her son or to his spouse. Whether these transfers were made in contemplation of death within the meaning of section 2035[4] depends upon the dominant motive of the decedent which we must determine on the

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4. SEC. 2035. TRANSACTIONS IN CONTEMPLATION OF DEATH.

(a) General Rule.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer * * *, by trust or otherwise, in contemplation of his death.

(b) Application of General Rule.—If the decedent within a period of 3 years ending with the date of his death * * * transferred an interest in property, * * * such transfer * * * shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section * * *; but no such transfer * * * made before such 3-year period shall be treated as having been made in contemplation of death.

basis of all of the facts and circumstances. *United States v. Wells*, 283 U.S. 102 (1931); *Estate of Hunt v. Commissioner*, 14 T.C. 1182 (1950); *Allen v. Trust Co.*, 326 U.S. 630 (1946); *Estate of Ford v. Commissioner*, 53 T.C. 114 (1969), affd. per curiam 450 F. 2d 878 (2d Cir. 1971). A rebuttable presumption in respondent's favor exists under the statute.[5] Section 2035(b), *Estate of Honickman v. Commissioner*, 58 T.C. 132, 135 (1972), affd. without opinion 481 F. 2d 1399 (3d Cir. 1973); *Cleveland Trust Co. v. United States*, 421 F. 2d 475 (6th Cir. 1970).

Section 20.2035-1(c), Estate Tax Regs., defines some of the relevant factors to be considered in determining whether a transfer was made "in contemplation of death." These factors include any disposition of property: "(1) made with the purpose of avoiding death taxes; (2) made as a substitute for a testamentary disposition of the property; or (3) made for any other motive associated with death." Moreover, "the bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized in order to determine whether or not such thought prompted the disposition."

A careful review of the record in the instant case convinces us that the transfers here were a substitute for testamentary disposition, and that the thought of death was the impelling cause of the transfers. *United States v. Wells, supra; Estate of Johnson v. Commissioner*, 10 T.C. 680 (1948).

In addition to the factors included in the regulations, this Court, in *Estate of Johnson v. Commissioner, supra* at 688, stated that among the factors to be considered in

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5. P.L. 94-455, sec. 2001(a)(5) (Oct. 4, 1976). The Tax Reform Act of 1976 altered this rebuttable presumption to one of a conclusive presumption.

determining the dominant motive of a decedent in making an inter vivos transfer of property are:

> (a) The age of the decedent at the time the transfers were made; (b) the decedent's health as he knew it, at or before the time of the transfers; (c) the interval between the transfers and the decedent's death; (d) the amount of the property transferred in proportion to the amount of property retained; (e) the nature and disposition of the decedent, e.g., whether cheerful or gloomy, sanguine or morbid, optimistic or pessimistic; (f) the existence of a general testamentary scheme of which the transfers were a part; (g) the relationship of the donee or donees to the decedent, i.e., whether they were the natural objects of his bounty; (h) the existence of a long established gift-making policy on the part of decedent; (i) the existence of a desire on the part of the decedent to escape the burden of managing property by transferring the property to others; (j) the existence of a desire on the part of the decedent to vicariously enjoy the enjoyment by the donees of the property transferred; and (k) the existence of the desire by the decedent of avoiding estate taxes by means of making *inter vivos* transfers of property. * * *

While his mother was less than fully capacitated in the last years of her life, her son decided the specific dates the gifts in issue would be made and when the checks should be prepared. In fact, he kept his mother's checkbook, filled in the names of the payee, decided on the amounts and, in some instances, had his own hand over his mother's hand as he drew her signature. The transfers herein were made by the decedent, on the advice of her son, who was also her lawyer. They occurred almost simultaneously with the failing of decedent's health. The

petitioner was working so closely with his mother that, in fact, he was dominating everything she was doing.

Since petitioner handled his mother's financial affairs, he was in a position to have intimate knowledge concerning the assets she owned and the values thereof. Moreover, decedent's son was the only person decedent ever consulted for estate planning, and such plans attempted to take approximately 43 percent of her assets out of her gross estate at a time when her medical expenses were rising sharply because of her rapidly deteriorating health.

These circumstances all strongly support the statutory presumption and respondent's determination. *Davis v. Commissioner,* 142 F. 2d 450 (6th Cir. 1944); *Oliver v. Bell,* 103 F. 2d 760 (3d Cir. 1939); *Estate of Borner v. Commissioner,* 25 T.C. 584, 587 (1955); *Estate of Gidwitz v. Commissioner,* 14 T.C. 1263 (1950), affd. 196 F. 2d 813 (7th Cir. 1952).

Petitioner's arguments to counteract the foregoing considerations are not persuasive. He argues that the gifts began in 1956, and continued while decedent's husband was alive to support the inference of a gift-giving program "within the family." But her husband's gifts cannot be "inferred" to decedent and the record shows only two prior gifts on her part. One, a deposit slip in the amount of $1,000 in 1956, and two, a note in December 1967, indicating the transfer of $6,000 worth of "E" Bonds from decedent and her husband to their son.

Petitioner testified at the trial that the decedent was desirous of making the donees, "parents of her only grandchild, financially independent to the extent that they could render extraordinary attention to the youngster." No evidence was adduced to show that the decedent was particularly interested in making life easier for her grandson. In fact, from the time decedent entered Swope Health

Care Center, until her death, the record indicates that she saw her grandson only once despite the fact that he lived only 10 to 15 miles away.

Petitioner would have us believe that at age 77 his mother saw no need to have a will. This argument on petitioner's part really proves too much. With almost half of her assets removed from her estate by the gifts here in issue her need for a will was much reduced. We must reasonably assume that decedent's lack of will ties in with her son's intention to give her estate away. We believe that the above facts show a carefully devised plan, the primary purpose of which was to reduce the gross estate below the $60,000 statutory exemption.

Having considered all of the relevant facts, we hold that the transfers herein were made in contemplation of death within the meaning of section 2035.

The next issue is whether the estate is liable for the addition to the tax imposed under section 6651(a)(1). Such section imposes an addition to the tax for the failure to file a return when due unless it is shown that such failure is due to reasonable cause and not due to willful neglect. We can find no support for the petitioner's contention that the addition to the tax for the late filing of the estate tax return is not applicable since he miscalculated the due date of the return. The respondent's regulations state that a failure to file is due to reasonable cause where the taxpayer exercised ordinary business care and prudence and, nevertheless, was unable to file within the prescribed time. Sec. 301.6651-1(c), Income Tax Regs. Mere uninformed belief, such as petitioner's miscalculation, no matter how sincere or innocent, has been considered insufficient to constitute reasonable cause. *Henningsen v. Commissioner*, 26 T.C. 528 (1956), affd. 243 F. 2d 954

(4th Cir. 1957); *Herman v. Commissioner*, 32 T.C. 579 (1959), affd. 283 F. 2d 227 (8th Cir. 1960). See *Beck Chemical Equipment Corp. v. Commissioner*, 27 T.C. 840 (1957). Accordingly, we sustain respondent's determination.

Because of concessions,

Decision will be entered under Rule 155.

UNITED STATES TAX COURT

Docket No. 11664-77

ESTATE OF ANNABEL L. CADY, Deceased, ELWYN L. CADY, JR., Ancillary Administrator, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the opinion of the Court filed August 15, 1979, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a net deficiency in estate tax due from the petitioner in the amount of $4,397.62;

That there is an addition to the tax due from the petitioner under the provisions of I.R.C. § 6651(a)(1) in the amount of $219.88.

Judge.

Entered:

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1069

September Term, 1980

Estate of Annabel L. Cady, deceased, Elwyn L. Cady, Jr.,
Ancillary Administrator,
Appellant,

vs.

Commissioner of Internal Revenue,
Appellee.

Appeal from the United States Tax Court.

The Court, having considered Appellant's pro se petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

October 8, 1980

No. 80-1141

In the Supreme Court of the United States

OCTOBER TERM, 1980

ESTATE OF ANNABEL L. CADY, DECEASED, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1141

ESTATE OF ANNABEL L. CADY, DECEASED, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the decision below in this federal estate tax case holding that gifts from the decedent to her son within 28 months preceding her death in 1974 were made in contemplation of death and thus includible in her gross estate. After examination of all of the relevant facts, the Tax Court found (Pet. App. A10-A12) that the decedent's gifts were made in contemplation of death. The court of appeals affirmed, holding (Pet. App. 3) that the Tax Court had applied the correct legal standard and that its findings were not clearly erroneous.

Section 2035(a) of the Internal Revenue Code of 1954 (26 U.S.C. (1964 ed.)), as in effect during the years involved in this case,[1] provided that the value of property transferred by the decedent, without adequate consideration, in contemplation of death is includible in the decedent's gross estate for federal estate tax purposes. The statute also created a rebuttable presumption that "unless shown to the contrary," gifts made during the three years prior to death were made in contemplation of death. Section 2035(b).

Petitioner argues (Pet. 6-7) that the evidence does not support the statutory presumption and that the Tax Court drew improper inferences from the evidence. But this fact-bound ruling is "of no importance save to the litigants themselves" (*Rudolph* v. *United States*, 370 U.S. 269, 270 (1962)). There is accordingly no legal question warranting review by this Court. Moreover, the change in the statute (see *supra*, note 1), which requires the value of all property transferred by a decedent within three years of death to be

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[1]As the court of appeals observed (Pet. App. A2), Section 2035 was amended by Section 2001(a)(5) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1848, effective for all transfers made on January 1, 1977, or thereafter, to eliminate the rebuttable presumption of contemplation of death transfers. As amended, Section 2035(a) provides that "the value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, during the three-year period ending on the date of decedent's death."

included in the decedent's estate for estate tax purposes, deprives the question presented in this case of any continuing importance.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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